



*Maintaining Student
Records and Meeting
Confidentiality
Requirements under the*

***FAMILY EDUCATION RIGHTS
AND PRIVACY ACT—
F E R P A***

***INDIVIDUALS WITH DISABILITIES
EDUCATION ACT—
I D E A***

SECTION 504 OF THE REHABILITATION ACT—

5 0 4

A Primer for Educators



2006

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This information could be made available in alternative format, including large print, Braille, audio, tapes, or computer diskette.

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OVERVIEW



By far, the most important federal statute impacting student records is the Family Educational Rights and Privacy Act (FERPA), enacted in 1974 to ensure student/parent access to education records and to limit disclosures to others for unauthorized purposes. The FERPA regulations are found in Title 34 of the Code of Federal Regulations, Part 99 (34 CFR 99). The FERPA Regulations are important because they set forth the basic federal records retention and destruction requirements. The records of students with disabilities will also be subject to the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act and regulations. Finally, but certainly not least, is school district policy and procedure. Most schools will have their own requirements setting forth access procedures, copying fees, form of records, retention, and destruction schedules.

DEFINITIONS—RECORDS/CONFIDENTIALITY

Directory Information: information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended.

Disclosure: to permit access to or the release, transfer, or other communication of education records—or the personally identifiable information contained in those records—to any party, by any means, including oral, written, or electronic means.

Education Records: those records that are directly related to a student, contain personally identifiable information, and are maintained by the school district or institution or by a party acting for the agency or institution. The term does not include sole possession records of instructional, supervisory, and administrative personnel, provided that the record is kept in the sole possession of the maker of the record and is not accessible or revealed to any other person except a temporary substitute for the maker of the record.

Eligible Student: a student who has reached age of majority or is attending an institution or postsecondary education.

Records: any information recorded in any way including, but not limited to, handwriting, print, film, microfilm, microfiche, and all electronic records such as email, CD, and or DVDs.

WHY FERPA WAS ENACTED

1. Schools had denied parents access to their children's school records while allowing others, like government agents and prospective employers, access.
2. Types of information contained in school records were, in many cases, inaccurate. Information was not always confined to fact or derived for educational purposes; innuendo and gossip were often noted.
3. Right of access to students' school records varied widely from State to State, controlled largely by common law principles, rudimentary case law, and school policy.

FERPA AND CONFIDENTIALITY

FERPA was enacted to ensure the confidentiality of personally identifiable information in education records and to guarantee parents access to their children's education records. The statute defines "education records" that are subject to its requirements, specifies who can see them and under what conditions, and contains procedures for complaints.

Any school district or institution receiving funds under any federal program is subject to FERPA. All public elementary and secondary schools, charter schools, institutions of postsecondary education, and many private schools are subject to FERPA.

RIGHTS

Either parent has the right to inspect and/or review their student's education record unless the school district or institution has been provided with evidence that there is a court order or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights. (FERPA 99.4)

When a student reaches age of majority, the rights accorded to, and consent required of, parents under FERPA transfer from the parents to the student. (FERPA 99.5)



SCHOOL DISTRICT REQUIREMENTS

Each school or educational agency must do the following:

1. *Adopt an education records policy and implement procedures that meet the standards of FERPA 99.6.*
2. *Annually notify parents and students in attendance of their rights pertaining to student records according to FERPA 99.7.*
3. *Maintain a permanent file on each student.*
4. *Maintain separate special education records.*
5. *Provide public notice of directory information and provide parents an opportunity to refuse to disclose such information.*
6. *Provide annual training to school staff on records and confidentiality.*

ACCESS RIGHTS

The school shall permit a parent to inspect and review the education records of the student. The school shall comply with a request for access to records within a reasonable period of time but in no case more than 45 days after it has received the request.

FEES

A school may charge a fee for a copy of an education record unless the imposition of a fee effectively prevents a parent from exercising the right to inspect and review the student's education records.

PRIOR CONSENT REQUIRED FOR DISCLOSURE

The parent shall provide a signed and dated written consent before a school discloses personally identifiable information from the student's education records, except as provided in FERPA 99.31.

PRIOR CONSENT NOT REQUIRED FOR DISCLOSURE

A school may disclose personally identifiable information from an education record of a student without the written consent of the parent **if** the disclosure is

1. To officials of another school or institution in which the student seeks to enroll provided that the school has a notice in its policies that it forwards education records on request to a school in which the student seeks or intends to enroll;
2. For directory information if the school has given public notice to parents of students in attendance of the types of information that the school has designated as directory information—a parent has the right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information;
3. To organizations conducting studies for or on behalf of educational agencies or institutions to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction provided that the personally identifiable information is destroyed when no longer needed for the purposes for which the study was conducted; and/or
4. To comply with a judicial order or lawfully issued subpoena if the school or institution makes a reasonable effort to notify the parent of the order or subpoena in advance of compliance.

RECORD OF ACCESS

A school shall maintain a record of each request for access to and each disclosure of information from the education records of each student. The record must include the date of access, the person's name, and the purpose for accessing the record. (See an example in the Appendix.)

A record of access does not apply if the request was from or the disclosure was to the parent, eligible student, authorized school official, a party with written consent from the parent, or a party seeking directory information.

DISCLOSURE TO FEDERAL AND STATE OFFICIALS

Authorized federal and State officials may have access to education records in connection with a monitoring or evaluation of federal or State supported education programs or for the enforcement of or compliance with federal legal requirements that relate to those programs. (FERPA 99.35)

DISCLOSURE FOR HEALTH AND SAFETY

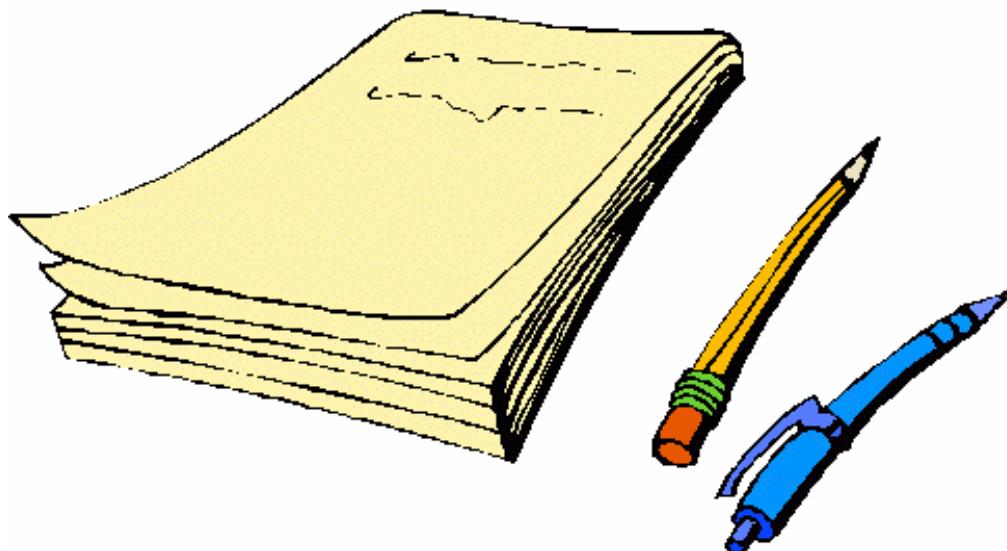
A school may disclose information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. (FERPA 99.36)

AMENDMENT

When a parent believes the information contained in the student's education record is inaccurate, misleading, or in violation of the privacy or other rights of the student, the parent may ask the school to amend the record. If the school decides not to amend the record, the parent shall be informed of their right to request a hearing under FERPA 99.21, 99.22.

COMPLAINT AND ENFORCEMENT

A person may file a complaint regarding an alleged violation under FERPA by writing the Family Policy Compliance Office, U.S. Department of Education, Washington, D.C. 20202-4605. (FERPA 99.60-99.64)



SPECIAL EDUCATION RECORDS

One of the most frequent complaints of special education staff is the amount of paperwork required for maintaining student records. This is a valid concern. Special educators need guidance and assistance to help them reduce unnecessary paperwork and provide techniques that would decrease time on paperwork, resulting in increased time to provide direct services for students with disabilities.

Confidentiality requirements need to be understood and followed by school staff maintaining special education records. Sharing information with unauthorized individuals can lead to liability issues for the school and can violate the student's civil rights.

In many cases, special education files contain more than the required documentation to meet minimal compliance standards. The importance of proper documentation cannot be overstated; however, too much paperwork can be confusing and hide the essential documents such as the current IEP, which is used to provide an appropriate educational program.

This section will help clarify issues of record keeping and confidentiality as it pertains to students in special education programs.

STAFF TRAINING

The school should provide information and annual training to all school staff regarding the importance of confidentiality and proper maintenance of special education records each school year. This could include the following:

- Special education teachers
- General education teachers
- Related service providers
- Paraeducators
- Bus drivers
- Secretaries
- Administrators
- Volunteers
- Substitute teachers



CONTENT OF SPECIAL EDUCATION FILES

Since many students are in special education programs for numerous school years, the special education file tends to become very bulky. A school can decide what record keeping system is best to fulfill their particular needs; however, the following suggested system will provide an efficient method to manage student records.

The recommendation is to create a two-tier process for maintaining special education and/or Section 504 records. The *primary* file is kept with the main service provider or case manager and contains the essential compliance documents and current IEP.

Contents of Primary File

- Access log
- Building level support team—early intervening documentation
- Referral form
- Initial consent to evaluate/consent for reevaluation
- Multidisciplinary team report (eligibility determination)
- Current Individualized Education Program
- Initial permission for placement
- Current written notices and meeting notices

The primary file contains a limited amount of information and is bound in chronological order. At the end of the school year, outdated information, such as the old IEP and written notices, are sent to the special education director's office to be filed in the *secondary* file.

Contents of Secondary File

- Parent correspondence
- Written notices over one year old
- Outdated IEPs
- Test protocols
- Annual review minutes
- Student work samples
- Written correspondence
- Discipline notices
- Three-year evaluation documentation



ACCEPTANCE OF SPECIAL EDUCATION RECORDS

Schools receive students in special education who transfer at various times during the school year. When a student transfers to another school, the records should be sent as soon as possible to avoid any delay in services. It is never advisable to serve a student until the special education records have been obtained and reviewed by the reviewing special education staff. If the team disagrees with the findings and conclusions of the sending school, they can always order, with parent notification and consent, additional evaluations to validate past findings or provide reasons to proceed in a different direction. An IEP Team meeting should be called to review the records and make recommendations on any program changes.

CASE MANAGER/RECORD LOCATOR

It is best to assign a case manager to each student eligible for Section 504 and/or special education services. This individual would take the responsibility of storing and maintaining the student record. The case manager is usually the staff member who is the primary service provider. A record locator should be included in cumulative files and other student records listing a phone number, fax number, and/or E-mail address that can be used by the receiving school to determine if additional records exist on the student.

RECORD DESTRUCTION

FERPA does not address how long records should be kept. School districts can establish their own policy and procedures. A standard is five to seven years after the student exits the educational program.

A school district must destroy personally identifiable information at the parent's request when that information is no longer needed to provide educational services. This can be accomplished by removing personal identifiers from retained records. When records are no longer needed for educational purposes, a school may separate them from active files and retain them in a special file with limited access.

Although largely complementary, IDEA regulations on student records go beyond the requirements of FERPA in some respects. For example, IDEA requires that parents be informed when a school proposes to destroy student records. Parents must be informed of their right to request destruction of information whenever their child graduates or leaves school, and with certain exceptions, this information must be destroyed at the parent's request. The district may establish specific times, such as IEP meetings, school registration, or program completion, to inform parents that personally identifiable information is no longer required and will be destroyed.

A school district, however, may retain a permanent record of a student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed even over parental objections. Parents can request that their child's record be amended if they feel the contents are misleading or inaccurate. If the school disagrees, the parent can request a hearing. If the parent does not prevail at the hearing, they can ask that a written statement be included in the record that explains their position.

QUESTIONS/ANSWERS

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

The following are common questions and answers regarding FERPA.

1. **Question:** **Are schools required to comply with FERPA?**
Answer: Any school that receives federal education funds from the United States Department of Education must follow the procedures required by this federal law. Reference 41 CFR 99.1
2. **Question:** **What kinds of student records are parents allowed to review?**
Answer: FERPA applies to all records, files, documents, and other materials that contain information directly relating to a student and are maintained by the school district. Reference 41 CFR 99.3
3. **Question:** **May students see the same records as parents?**
Answer: No. While FERPA permits students to see their own records if they are over 18, there are some records that can be withheld:
 - (1) Psychiatric or “treatment” records (Students can, however, request that a doctor of their choice review the record for them.)
 - (2) Financial records of their parents—Reference 41 CFR 99.12
4. **Question:** **If requested, when does the school show the records to parents?**
Answer: Under FERPA, the school has 45 calendar days to comply with the parents’ request. Some schools have written procedures that establish a shorter time period. In this case, the school must comply with their shorter time period. Reference 41 CFR 99.11
5. **Question:** **May parents bring someone with them, such as their child or a friend, to examine the records?**
Answer: Yes. While FERPA does not state specifically that parents have this right, other federal regulations (IDEA) state that parents may authorize others to see the records. The school may ask that parents sign a statement indicating that the friend has such permission. Reference 34 CFR 300.562

6. **Question:** **Who else may see a student's records without parental consent?**

Answer: (a) School officials in the same district with a “legitimate educational interest”

(b) School officials in another school system in which the student intends to enroll

(c) Various State and national educational agencies when enforcing federal laws

(d) Anyone to whom the school must report information as required by State statute

(e) Accreditation and research organizations helping the schools

(f) Student financial aid officials

(g) Those with court orders or subpoenas (Reference 41 CFR 99.31)

(h) During State monitoring activities

7. **Question:** **May probation officers see student records without parental consent?**

Answer: Under federal law, probation officers cannot see or receive information from student records without obtaining parental consent.

8. **Question:** **May parents see a list of everyone who has asked for and received information concerning their child during the year?**

Answer: Yes. The school is required to keep a list of everyone who requests and receives information with the records themselves. Parents have a right to this information. The list needs not include school employees who have seen the records. Reference 41 CFR 99.32

9. **Question:** **If parents think information is misleading or false, how can they get such information removed from the student's record?**

Answer: First, the parents request that such information be removed and state the reason for the request. If the school refuses to do so, then the parent can request a school hearing. The request should be put in writing and sent to the appropriate school official. At the very least, the parent can request the school insert their written statement explaining reasons why they believe the records are inaccurate. Reference 34 CFR 300.564, 34 CFR 300.567, 34 CFR 300.568, 34 CFR 300.569, 41 CFR 99.20, 41 CFR 99.21, and 41 CFR 99.22

10. **Question:** **Who has access to the student's records?**

Answer: Parents have the right to inspect and review the records of their child. Students who have reached the age of majority also have the right to review their records. State education agency staff and school personnel who are authorized to inspect

records are those certified personnel and school board members with a *legitimate educational interest* in reviewing the records.

For persons not so authorized to review records, the school must keep a log of parties obtaining access to student records showing the name of the person given access, date access was given, and the purpose for which the party was authorized to use the records. Reference 34 CFR 300.562, 34 CFR 300.571, 41 CFR 99.11, 41 CFR 99.30, 41 CFR 99.31, and 41 CFR 99.32

11. **Question:** **Do school board members have a right to know the names of students with disabilities?**

Answer: They have a right to the names of individual students with disabilities only for the purpose of carrying out duties of the School Board. Reference 41 CFR 99.31 and 41 CFR 99.32

12. **Question:** **When a request for transfer of records of a student with disabilities is received, including proper parental permission, should the school transfer all records?**

Answer: On notification of transfer, all the student's educational records shall be transferred, including behavioral records and reports contained in the cumulative file furnished to the sending school by other private or public agencies. Reference 41 CFR 99.31

13. **Question:** **Are parents entitled to review their child's test protocols?**

Answer: The school must permit the parents of a student with a disability to inspect and review any educational records relating to their child, including test protocols. The procedure of allowing parents to examine and discuss the protocols in the school office under supervision would comply with the basic requirement under Reg. 300.562(a). Reference 34 CFR 300.562(a)

14. **Question:** **Who is responsible for storage of student test protocols?**

Answer: The school is responsible for ensuring that test protocols are accessible regardless of where they are stored. FERPA defines educational records as those which are "(1) directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution." A school psychologist would be considered "a party acting for" the school district; therefore, records maintained by a school psychologist would be accessible. Reference 41 CFR 99.5

SUMMARY

FERPA provides parents a clear avenue through which they might ensure that the personal dignity and confidential information concerning their child is protected. It is clearly the intent of this law to provide parents a definite role in the provision of accurate record keeping and in the protection of the confidential information concerning their child.

APPENDICES

FERPA BASICS—EDUCATION RECORDS

The following are basic issues when dealing with educational records:

1. FERPA is the Family Educational Rights and Privacy Act; the law outlines the requirement of educational record keeping.
2. Personally identifiable information about students must be kept confidential by the school district.
3. Each school district must have a written educational records policy.
4. Parents have the right to inspect and review their children's school records and can request copies.
5. Access to student records by school staff members must be recorded on an "access" log in each student's file, and the school records policy must identify by title the staff members with access to each type of student record.
6. Release of student information outside the school requires parental consent, except (1) school district defined "directory information," (2) within the public school system, and (3) in health and safety emergencies.
7. Parental access rights transfer to adult students when they reach age of majority.
8. Parents may request an amendment of records that they consider "inaccurate, misleading, or in violation of the student's rights of privacy or other rights."
9. Notes concerning a student made by a staff member, retained by that person, and not shared with anyone are exempt from parental access.
10. Education records do not include treatment records of students 18 years or older that are maintained by a health professional.

**SCHOOL DISTRICT
SPECIAL EDUCATION DOCUMENTATION OF
ACCESS TO RECORDS**

These records are **confidential** and may only be accessed by individuals who have a right to know, including parents, classroom teacher, special education teacher, related education service staff, special education paraeducator, building administrator, and special education director.

Student: _____ DOB: _____

Each school should keep a record of persons obtaining access to special education records. The record will include the name of the person, date of access, and the purpose for which the person is authorized to use the records. Access and use of student records will follow guidelines outlined by the Family Education Records Privacy Act.

Attention!

Student Record Locator

This file may not contain all records for this student. To determine if other records exist, please call, e-mail or write to

_____School

_____Address

_____Phone Number

_____Fax

_____E-mail

FAMILY EDUCATION RIGHTS AND PRIVACY ACT (FERPA)

ANNUAL NOTICE

In accordance with federal regulations and for the benefit of parents and students in the school district, this notice serves to notify parents of students currently in attendance and students of legal age of their rights regarding educational records and confidentiality.

YOUR RIGHTS

You have the right to the following:

1. Inspect and review your child's educational record.
2. If you feel the educational record is misleading or inaccurate, you can request an amendment to the part of record that is inaccurate.
3. Give written consent before any personally identifiable information is released about your child.
4. File a complaint with the Department of Education in Washington, D.C., which enforces regulations pertaining to educational records if alleged violations are being made by the school district and you have been unable to resolve those differences at the school district level.

Procedures to Obtain Educational Records

1. Contact the school principal and inform him/her that you would like a copy of your child's educational record.
2. Allow the school five days to copy and provide the requested information. There may be a small fee to cover the copying.

Procedures for Requesting a Change in Your Child's Education Record

1. Inform the school principal that you have discovered inaccurate or misleading information and would like it amended or removed.
2. Allow the school district five to 10 working days to decide whether your request is valid.
3. If the school district disagrees with the request, you can file for a hearing with the school district to voice your concerns.
4. If, as a result of the hearing, the school district decides that the information is inaccurate or misleading, the school will amend the record and inform you of the amendment in writing.
5. If, as a result of the hearing, the school district decides the information is accurate and not misleading, they will notify you of the right to place a statement in the record explaining why you feel the information is misleading or incorrect.
6. The school district is obligated to place a copy of your statement in the educational record.

For more information or further explanation, please contact

Name: _____

Address: _____

Phone: _____

ELECTRONIC TRANSFER OF RECORDS



UNITED STATES DEPARTMENT OF EDUCATION OFFICE OF MANAGEMENT

Mr. John Copenhaver
Director
Mountain Plains Regional Resource Center
Utah State University
1780 North Research Parkway, Suite 112
Logan, Utah 84321

Dear Mr. Copenhaver:

This is in response to your April 4, 1995, inquiry regarding requirements related to special education records. Your letter, which you addressed to Dr. Tom Hehir, Office of Special Education Programs, was forwarded to this Office for response on June 28, 1995, because we administer the Family Educational Rights and Privacy Act (FERPA), which relates to your concerns.

You ask in your letter whether it is "permissible to transfer special education student records by fax or computer networks." In this regard, you state:

It is not uncommon to see special education student records transferred from one agency to another via fax or computer networking.

You also ask whether it is permissible to include notices that a student is receiving special education services in a student's cumulative file. You state:

Many school districts insert a notice in the student's cumulative file indicating there is a separate special education file located in another office.

FERPA generally protects parents' and students' privacy interests in "education records." The term "education records" is defined as those records which contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3 "Education records." FERPA applies to all education records, including the records of students who receive special education services.

FERPA does not generally address what education records a school may or may not maintain or where the school maintains such records. Thus, under FERPA, a school would not be prohibited from placing a notice in a student's cumulative records which states that the student receives special education services and that another file exists in another office.

With regard to your question regarding the transfer of education records, FERPA generally requires that a parent or eligible student¹ provide written consent prior to the disclosure of personally identifiable information from education records, except in certain specified circumstances. 34 CFR §§ 99.30 and 99.31. For instance, prior written consent is not necessary when the disclosure is to a school official within the educational agency or institution with legitimate educational interest or when the disclosure is to a school in which the student is seeking or intending to enroll. See 34 CFR § 99.31(a) (1) and (2). For a list of the circumstances under which nonconsensual disclosures may be made, please refer to § 99.31 of the enclosed regulations.

FERPA does not generally address the manner in which education records may be disclosed. While on its face FERPA does not prohibit the transfer of education records to authorized parties by whatever means a school chooses, a school should take into consideration the potential for nonconsensual disclosures of education records resulting from a particular type of transfer. While we believe that the likelihood of an improper disclosure of education records that would result from transferring information to other school officials within an educational agency or institution by facsimile or internal computer network is minimal, it is the responsibility of each school to determine what precautions are necessary to protect education records in compliance with FERPA.

I trust that the above information is responsive to your inquiry. In addition to the regulations, enclosed are a model student records policy and a model annual notification of rights to parents. Should you have additional questions regarding this matter of FERPA in general, please do not hesitate to contact this Office directly. Our current address and telephone number are:

Family Policy Compliance Office
U.S. Department of Education
600 Independence Avenue, SW
Washington, DC 20202-4605
(202) 260-3887

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

¹ All rights afforded parents under FERPA transfer to the student when the student becomes an "eligible student." The term "eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary education.

THE RELATIONSHIP OF HIPAA TO SPECIAL EDUCATION

*Compiled by Catherine Benitz, Program Specialist, Mountain Plains Regional Resource Center
September 2006*

The purpose of this paper is to provide clarification to educators regarding the privacy of records and information related to the requirements of the Health Insurance Portability and Accountability Act (HIPAA) of 1996. This paper was originally distributed in 2003 and has been updated with resources and web page links. Additional resources and websites are provided for the reader to obtain current information regarding the required privacy regulations.

What is HIPAA?

The Health Insurance Portability and Accountability Act of 1996, known as HIPAA, includes important—but limited—protections for millions of working Americans and their families around the ability to obtain and keep health coverage. Among its specific protections, HIPAA does the following:

- Limits the use of preexisting condition exclusions.
- Prohibits group health plans from discriminating by denying you coverage or charging you extra for coverage based on your or your family member's past or present poor health.
- Guarantees certain small employers and certain individuals who lose job-related coverage the right to purchase health insurance.
- Guarantees, in most cases, that employers or individuals who purchase health insurance can renew the coverage regardless of any health conditions of individuals covered under the insurance policy.

In short, HIPAA may lower the individual's chance of losing existing coverage, ease the ability to switch health plans, and/or help buy coverage if an individual loses an employer's plan and has no other coverage available.

What is the HIPAA Privacy Rule?

The privacy provisions of the federal law, HIPAA, apply to health information created or maintained by health care providers who engage in certain electronic transactions, health plans, and health care clearinghouses. The Department of Health and Human Services (DHHS) has issued the regulation, "Standards for Privacy of Individually Identifiable Health Information," applicable to entities covered by HIPAA. The Office for Civil Rights (OCR) is the departmental component responsible for implementing and enforcing the privacy regulation. (See the Statement of Delegation of Authority to the Office for Civil Rights, as published in the Federal Register on December 28, 2000.

<http://www.hhs.gov/ocr/hipaa/bkgrnd.html>

The DHHS issued the privacy rule to implement the requirement of HIPAA. The privacy rule standards address the use and disclosure of individuals' health information, or "protected health information," by organizations subject to the privacy rule, or "covered entities," as well as standards for individuals' privacy rights to understand and control how their health information is used. Within DHHS, the OCR has the responsibility for implementing and enforcing the Privacy Rule with respect to voluntary compliance activities and civil money penalties.

A major goal of the privacy rule is to ensure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high-quality health care and to protect the public's health and well being. The rule strikes a balance that permits important uses of information while protecting the privacy of people who seek care and healing. Given that the health care marketplace is diverse, the rule is designed to be flexible and comprehensive to cover the variety of uses and disclosures that need to be addressed. (See *U.S. DHHS, OCR PRIVACY BRIEF, Summary of the HIPAA Privacy Rule, HIPAA Compliance Assistance at* <http://www.DHHS.gov/ocr/privacysummary.pdf>)

What is FERPA and how is it different from HIPAA?

The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy of student **education records**. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."

FERPA defines education records as those records that contain information directly related to a student that are maintained by an education agency, institution, or person acting for the agency or institution. (<http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>)

Health records are defined through the HIPAA privacy regulation, 45 CRR, § 164.501: *Protected Health Information* means any individually identifiable health information that is

- Transmitted by electronic media,
- Maintained in any medium described in the definition of electronic media at §162.103 of this subchapter, and
- Transmitted or maintained in any other form or medium.

Protected health information **excludes** individually identifiable health information in education records covered by FERPA, as amended, 20 U.S.C. 1232g.

Must public schools and education agencies comply with HIPAA?

The preamble to the privacy regulation includes the following statement by the DHHS, the entity responsible for developing HIPAA Privacy:

While we strongly believe every individual should have the same level of privacy protection for his/her individually identifiable health information, Congress did not provide us with authority to disturb the scheme it had devised for records maintained by educational institutions and agencies under FERPA. We do not believe Congress intended to amend or preempt FERPA when it enacted HIPAA.

The HIPAA final rule explains that records that are subject to FERPA are not subject to HIPAA. Additionally, medical records that are exempt from FERPA's definition of "education records" under the section 99.3 provision are also exempt from coverage by HIPAA. (*Page 82483 of the December 28, 2000, Federal Register HIPAA final rule*)

Who must comply with HIPAA?

As required by Congress in HIPAA, the Privacy Rule covers the items listed below:

- Health plans
- Health care clearinghouses
- Health care providers who conduct certain financial and administrative transactions electronically (These electronic transactions are those for which standards have been adopted by the Secretary under HIPAA, such as electronic billing and fund transfers.)

These covered entities are bound by the new privacy standards even if they contract with others (called “business associates”) to perform some of their essential functions. The law does not give the DHHS the authority to regulate other types of private businesses or public agencies through this regulation. For example, DHHS does not have the authority to regulate employers, life insurance companies, or public agencies that deliver social security or welfare benefits.

Many of the questions regarding covered entities, disclosures, access, and policies can be found at the Question and Answer site located at <http://answers.hhs.gov/>. Specific questions are answered by clicking on the link to Health Information Privacy Policy sub- categories.

What does the HIPAA Privacy Rule require providers to do?

Covered Entities must protect individually identifiable health information against deliberate or inadvertent misuse or disclosure. Consequently, health plans and providers must maintain administrative and physical safeguards to protect the confidentiality of health information as well as protect against unauthorized access. HIPAA final rules explicitly mention the following actions:

- Adopt written privacy procedures.
- Train employees about security.
- Designate a privacy officer.
- Develop legal agreements that extend privacy protections to third-party business associates.
- Obtain patient consent for most disclosures of protected health information.
- Provide the minimum amount of information necessary.

Those that misuse personal health information can be punished. The DHHS Office for Civil Rights, which is responsible for implementing the Privacy rules, can impose civil monetary penalties and criminal penalties for certain wrongful disclosures of protected information. Civil penalties can be imposed up to \$25,000 per year and criminal penalties can range from \$50,000 and one year in prison to \$250,000 and 10 years in prison.

These entities must inform individuals about how their health information is used and disclosed and ensure them access to their information. Written authorization from patients for the use and disclosure of health information for most purposes is also required with the exception of health care treatment, payment, and operations (and for certain national priority purposes).

(See Kumekawa, Joanne K. (September 30, 2001) "Health Information Privacy Protection: Crisis or Common Sense?" *Online Journal of Issues in Nursing*. Vol. #6 No. #3, Manuscript 2. Available at http://www.nursingworld.org/ojin/topic16/tpc16_2.htm)

Would education programs ever be subject to HIPAA?

You may need to contact DHHS to inquire about the applicability of HIPAA to records on non-students. However, students' medical records and education records under FERPA are not subject to HIPAA and should not be disclosed to DHHS under HIPAA.

Educational institutions that provide health care services to individuals other than students or that provide health care coverage to their employees need to be familiar with and may be subject to HIPAA. Educational institutions that do not receive federal funds and maintain any student medical records may also be subject to HIPAA requirements.

The procedures for the submission of electronic records and billing of medical information would be subject to HIPAA. For example, schools or Part C agencies that bill Medicaid for therapeutic services would need to comply with HIPAA for those procedures.

The safeguards for the protection of privacy under both regulations are comparable and ensure confidentiality if staff members are trained and procedures are in place to maintain privacy and confidentiality.

Where can I locate other resources?

- Office of the Assistant Secretary for Planning and Evaluation Administrative Simplification in the Health Care Industry
<http://aspe.os.dhhs.gov/admnsimp/>
- Office for Civil Rights—HIPAA
 - Medical Privacy—National Standards to Protect the Privacy of Personal Health Information
<http://www.DHHS.gov/ocr/hipaa/assist.html>
 - Overview of information from the Office of Civil Rights
<http://www.DHHS.gov/ocr/hipaa/guidelines/overview.pdf>
 - What's new at the Office for Civil Rights - HIPAA
<http://www.DHHS.gov/ocr/hipaa/whatsnew.html>
- HIPAA Privacy Rule and Research Website (National Institute of Health)
<http://privacyruleandresearch.nih.gov/>
- Final Modifications to the Privacy Rule published in the *Federal Register*
www.DHHS.gov/ocr/hipaa/finalreg.html
- FERPA Regulations
<http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>
- FERPA on-line library with reference to HIPAA
<http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html>

GENERAL GUIDANCE FOR RECORD KEEPING AND MAINTAINING CONFIDENTIALITY

The following is guidance with respect to maintaining confidentiality at public schools.

- Written or oral information about student and families is shared only with other personnel who have an explicit need to know for the benefit of the student/family (not for the benefit of the provider).
- Information about one student is not shared with another student or parent under any circumstances.
- Only necessary information will be shared with those who have an “educational interest” in the student.
- Information should not be obtained from a parent or other person based on a promise that the information so obtained will not be shared with other appropriate personnel.
- Discussions concerning confidential information are to take place in secured locations, not in hallways, stairwells, staff lounges, parking lots, or on the playground.
- Confidential written documentation or notes of oral confidential communications should be stored in secure locations, and when in use, should be shielded from the view of others approaching the desk, and should not be left on a desk at all when the staff member has occasion to leave the desk.
- Confidential information should not be left as a message with a secretary, on a voice mail, or on an electronic mail system.
- Confidential information that must be mailed or carried should be placed in an envelope marked confidential.
- Confidential information received by a school that was not requested or needed should be made part of the student's/child's record and should be returned to the sender or shredded.
- Confidentiality should be maintained regardless of how the information is obtained (written, oral, electronic).
- All staff and volunteers should be held to the same standard of confidentiality.
- A school should have an explicit policy on the confidentiality of student/child information, which is coordinated with the school's records policy.

PROTECTING THE PRIVACY OF STUDENT EDUCATION RECORDS

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Student education records are official and confidential documents protected by one of the nation's strongest privacy protection laws, the Family Educational Rights and Privacy Act (FERPA). FERPA, also known as the Buckley Amendment, defines education records as all records that schools or education agencies maintain about students.

FERPA gives parents (as well as students in postsecondary schools) the right to review and confirm the accuracy of education records. This and other United States "privacy" laws ensure that information about citizens collected by schools and government agencies can be released only for specific and legally defined purposes. Since enacting FERPA in 1974, Congress has strengthened privacy safeguards of education records through this law, refining and clarifying family rights and agency responsibilities to protect those rights.

FERPA's legal statute citation can be found in the U.S. Code (20 USC 1232g), which incorporates all amendments to FERPA. FERPA regulations are found in the Federal Register (34 CFR Part 99). FERPA's 1994 amendments are found in Public Law (PL) 103-382.

FERPA Protects Privacy

FERPA applies to public schools and state or local education agencies that receive Federal education funds, and it protects both paper and computerized records. In addition to the Federal laws that restrict disclosure of information from student records, most states also have privacy protection laws that reinforce FERPA. State laws can supplement FERPA, but compliance with FERPA is necessary if schools are to

continue to be eligible to receive Federal education funds.

FERPA requires schools and local education agencies to have written and accessible policies about how they restrict the release of student records. The policies must explain parents' rights under FERPA, define what qualifies as "directory information" (personal information that can be made public), set procedures for reviewing and correcting records, and explain how and when student information can be disclosed. When students reach the age of 18, or when they become students at postsecondary education institutions, rights under FERPA transfer from the parents to the students.

FERPA gives both parents, custodial and noncustodial, equal access to student information unless the school has evidence of a court order or state law revoking these rights.

FERPA Defines an Education Record

Education records include a range of information about a student that is collected in schools, such as:

- Date and place of birth, parent(s) and/or guardian addresses, and where parents can be contacted in emergencies;
- Grades, test scores, courses taken, academic specializations and activities, and official letters regarding a student's status in school;
- Special education records;

- Disciplinary records;
- Medical and health records that the school creates or collects and maintains;
- Documentation of attendance, schools attended, courses taken, awards conferred, and degrees earned;
- Personal information such as a student's identification code, social security number, picture, or other information that would make it easy to identify or locate a student.

Personal notes made by teachers and other school officials that are not shared with others are not considered education records. Additionally, law enforcement records created and maintained by a school or district's law enforcement unit are not education records.

Part of the education record, known as *directory information*, includes personal information about a student that can be made public according to a school system's FERPA policy. Directory information may include a student's name, address, and telephone number, and other information typically found in school yearbooks or athletic programs. Other examples are names and pictures of participants in various extra curricular activities or recipients of awards, pictures of students, and height and weight of athletes.

Each year schools must give parents public notice of the types of information designated as directory information. By a specified time after parents are notified of their review rights, parents may ask to remove all or part of the information on their child that they do not wish to be available to the public without their consent.

FERPA Guarantees Parent Review and Appeal

If, upon review, parents find an education record is inaccurate or misleading, they may request changes or corrections, and schools and education agencies must respond promptly to these requests.

Requests should be made in writing according to local policies. Within a reasonable time period, the school or agency must decide if the request to change the record is consistent with its own assessment of the accuracy of the record. If a parent's request is denied, he or she must be offered the opportunity for a hearing. If parents' disagreement with the record continues after the hearing, they may insert an explanation of their objection in the record.

FERPA's provisions do not apply to grades and educational decisions about children that school personnel make.

While parents have a right to review records, schools are not required by Federal law to provide copies of information, unless providing copies would be the only way of giving parents access. Schools may charge: a reasonable fee for obtaining records, and they may not destroy records if a request for access is pending.

FERPA Restricts Disclosure of Student Records

Local education agencies and schools may release information from students' education records with the prior written consent of parents, under limited conditions specified by law, and as stated in local agencies' student records policies. The same rules restricting disclosures apply to records maintained by third parties acting on behalf of schools, such as state and local education agencies, intermediate administrative units, researchers, psychologists, or medical

practitioners who work for or are under contract to schools.

A school district is required, however, to have a policy that specifies the categories of officials and parties to whom records may be released without parent consent. The policy should be readily accessible to parents for review.

Teachers and school officials who work with the students and schools to which students apply for entrance may also have access to education records without parent consent. In addition, information from students' records may be released to State and local education officials to conduct audits or to review records in compliance with Federal laws. Schools may also disclose information from education records without the consent of parents in response to subpoenas or court orders. A school official must make a reasonable effort to notify the parent before complying with the subpoena unless the subpoena is issued to enforce a law and specifies not to notify the parent.

In emergencies, school officials can provide information from education records to protect the health or safety of the student or others.

There are cases when schools or school systems decide it is in the public interest to participate in policy evaluations or research studies. If student records are to be released for these purposes, the school or school system must obtain prior parent consent. Signed and dated written consent must:

- Specify the records that will be released;
- State the reason for releasing the records;
- Identify the groups or individuals who will receive the records.

In general, information about each request for records access and each disclosure of information from an education record must be maintained as part of the record until the

school or agency destroys the education record. Outside parties receiving records must receive a written explanation of the restrictions on the re-release of information.

Additional FERPA Provisions

In 1994, the Improving America's Schools Act amended several components of FERPA, tightening privacy assurances for students and families. The amendments apply to the following key areas:

- Parents have the right to review the education records of their children maintained by state education agencies;
- Any agency or institution that inappropriately re-releases personally identifiable information from an education record cannot have access to education records for five years;
- Information about disciplinary actions taken against students may be shared, without parents' consent, with officials in other education institutions;
- Schools may release records in compliance with certain law enforcement judicial orders and subpoenas without notifying parents.

Questions? Call Your Local School System, State Agency, or the Family Policy Compliance Office

School districts, state education agencies, and the U.S. Department of Education all offer assistance about FERPA. Before contacting Federal officials, you can often get a direct and immediate response from your local or state education officials.